SINGAPORE REPORTS.

MOHAMED IDRIS BIN HAJI MOHAMED SAID v. REX.

[App. Crim. Juris. (Murray-Aynsley, C.J.) Feb. 25, 1948]
[Singapore — Magistrates' Appeal No. 166 of 1947]

Criminal Procedure Code S. 254 — Change of Magistrate — Whether new Magistrate can act on evidence taken by former Magistrate.

In this case while the case was being heard the Magistrate who had begun the hearing of the case left the Colony and another Magistrate continued the hearing. The new Magistrate acted on the evidence recorded by the former Magistrate and subsequently convicted the appellant.

Held, (1) that the power given order Section 254 of the Criminal Procedure Code is of value when it is used for evidence of a more or less formal character or where the witness cannot be produced; (2) that in this case the decision was unsatisfactory as the witness whose evidence was acted on was a crucial one and there was nothing to show that it was not possible to produce the witness, and therefore there must be a re-trial.

MAGISTRATES' APPEAL.

Mark Morrison for the Appellant.

M. Buttrose (D.P.P.) for the Defendant.

Murray-Aynsley, C.J.:—In this case the appellant was employed as a clerk by the Singapore Harbour Board. On September 30th, 1946, a detective of the Harbour Board Police saw him carrying various articles, including a bottle of gin, a lady's hand-bag, two tins containing cake and four tubes of tooth-paste. The evidence showed that it would be within the scope of his duties to collect things of that kind, if he found them lying about, and place them in proper custody. The whole question of whether the appellant was guilty of stealing the goods in question depended, therefore, on what inference the Court could draw from the circumstances in which the detective found the appel lant carrying; whether the appellant had concealed them on his person, or whether he had put various articles inside his shirt (or coat, as the prosecution alleged).

Unfortunately while the case was being heard in the Court below the Magistrate who had begun the hearing of the case left the Colony and another Magistrate continued the hearing. By this time the appellant was represented by counsel. The question arose whether the new Magistrate should exercise the powers given him under section 254 and act on evidence recorded by his predecessor. The Magistrate seems to have been persuaded by counsel for the defence into acting on this evidence. He subsequently convicted the appellant. When the case came before me on appeal I did not consider that the trial could be regarded as satisfactory. The power given under the section is of value, particularly when it is used for evidence of a more or less formal character, or where the witness cannot be produced. In the present case the witness whose evidence was so acted on was a crucial one, and I cannot think that a decision can be regarded as satisfactory where it is based on evidence given before another Magistrate, particularly when there is nothing to prevent the witness from giving evidence on the further hearing.

I therefore acted on proviso (b) of the same section and ordered a new trial.

New Trial Ordered.

REX. v. TEO AH LAI AND 3 OTHERS.

[Special Case (Thorogood, J.) March 12, 1948]
[Singapore — Special Case No. 1 of 1948]

Singapore Colony Order in Council 1946 — Departmental Titles (Alteration) Ordinance No. 15 of 1937 — Whether Advisory Council can exercise the power of Legislative Council under S. 3 of Departmental Titles (Alteration) Ordinance — Certificate of Chemist — Criminal Procedure Code S. 427.

This was a special case forwarded for the opinion of the Court as to (1) whether the power of the Legislative Council under Section 3 of the Departmental Titles (Alteration) Ordinance No. 15 of 1937, has been transferred to the Advisory Council (2) whether if the said power has been so transferred a certificate of analysis under the hand of a "Chemist, Singapore" is admissible in evidence.

Held, (1) that the power of the Legislative Council under Section 3 of the Departmental Titles (Alteration) Ordinance No. 15 of 1937 had not been transferred to the Advisory Council; (2) that therefore the Certificate of the Chemist was not admissible in evidence under Section 427 of the Criminal Procedure Code.

Case referred to:—

(1) *Deputy Public Prosecutor v. Tan Ah Guat* (1947) 13 M.L.J. 32.

SPECIAL CASE.

M. Buttrose for the Crown.

D. K. Walters as *Amicus Curiae.*

Thorogood, J.: — This is a special case forwarded by one of the District Judges of Singapore. The facts considered to be proved are fully set out by the learned District Judge. The question of law for the opinion of this Court is whether the power of the Legislative Council under Section 3 of the Departmental Titles (Alteration) Ordinance No. 15 of 1937, has been

transferred to the Advisory Council; and whether if the said power has been so transferred a certificate of analysis under the hand of a "Chemist, Singapore" is admissible in evidence.

The constitution and the duties of the Advisory Council are set out in Section 41 of the Singapore Colony Order-in-Council 1946. The Governor may regulate the procedure and practice of the Advisory Council as he thinks fit and he may even declare the provisions of law establishing the Advisory Council shall cease to have effect. The Advisory Council is neither more nor less than what its name implies.

No suggestion was made at the hearing of this special case that the power of the Legislative Council had been transferred to the Advisory Council or that the latter Council had been substituted for the former. Where substitution has been necessary in the existing laws action has been taken. For example, under Section 42, para 2 (c) of the Order in Council provision has been made for references to the Governor of the Straits Settlements to be construed as references to the Governor of the Colony. There is no provision in the said order in Council by which the Advisory Council is substituted for the Legislative Council or any other law of which I am aware which transfers the powers of the Legislative Council to the Advisory Council. I am forced to the conclusion therefore that the answer to the first part of the question stated must be in the negative. The second part of the question before this Court does not arise therefore.

It is not disputed and could not have been in my opinion in view of the terms of Section 40 of the said Order in Council that, pending the appointment of a Legislative Council of the Colony, the law making power in the Colony rests in the Governor alone. The Governor is required to consult the Advisory Council before exercising that power but he is not bound to act in accordance with the advice given him by the members of the Advisory Council. Mr. Buttrose for the Crown, however, submitted that the amendment to Ordinance No. 15/1937 notified by Gazette Notification No. 376/47 had in fact been made by the Governor in exercise of his law making power and that it should be presumed that he had consulted the Advisory Council and that therefore the Gazette Notification refers to an act of the Governor alone upon a resolution of the Advisory Council. Mr. Buttrose therefore, while admitting that a more strict drafting of the Gazette Notification might have been desirable adopted a view set out in *Maxwell* on the Interpretation of Statutes, 9th Ed. at page 70 and submitted that "in order to suppress the mischief and advance the remedy" the actual language of the said notification should be extended by the Court to mean that the amendment in question had been made by the Governor. Mr. Walters submitted for the consideration of the Court that the Governor is not a member of the Advisory Council and that it cannot be presumed that he was necessarily aware of the resolution passed at the meeting of the Advisory Council on the 20th February 1947. There is indeed nothing before the Court to show what occurred at the meeting held on the 20th February except the Gazette Notification itself which states that the Advisory Council had by resolution approved an amendment to the Schedule of the Ordinance No. 15/1937. In my opinion as the Governor alone is entitled to submit questions to the Advisory Council for their advice, it can be presumed that the matter of amending the Schedule was in fact put to the Advisory Council by or on behalf of the Governor. But, as Mr. Walters submits, that is not sufficient to amend the law. The Governor is the only law making authority and a positive act in accordance with the Rules set out in para 14 of his Instructions is required by him before any law is made.

Ordinance No. 15/1937 was an existing law and as such was continued by the Singapore Colony Order in Council subject to the provisions of that order. Special provision is made by Section 3 of that Ordinance for the amendment of the Schedule thereto by the Legislative Council, but there being no Legislative Council at the material time advantage of that provision could not be taken. An amendment of the Schedule of the Ordinance is an amendment to the Ordinance itself. In the absence of any special provision to the contrary the Ordinance can only be amended by the authority in whom the power to make laws is vested, namely in this Colony at the material time, the Governor. The Gazette Notification in question has no reference to any act by the Governor with or without the advice of the Advisory Council; it merely gives information of a resolution of the Advisory Council and I can find nothing to justify a construction of that notification on the lines suggested by Mr. Buttrose.

In my opinion the Notification must be construed to mean precisely what it says. There being no legislative power in the Advisory Council, a resolution of that Council has by itself no effect whatever on the existing written law. I am of the opinion therefore that the relevant written law existing at the time this case was heard before the learned District Judge was precisely the same as that stated by Brown J., in the

case of the *Deputy Public Prosecutor v. Tan Ah Guat*[1], where the learned Judge held that a certificate of a chemist was not admissible as evidence under Section 427 of the Criminal Procedure Code. I respectfully agree with the learned Judge in that matter.

The learned District Judge said in his statement of the case before this Court that the charges made were substantiated only by the admission of the Chemist's certificate. In view of my determination of the question in this case stated the said certificate should not have been admitted by the District Judge. In all the circumstances of the case it seems fit to me not to remit this matter to the learned District Judge but to make an order thereon forthwith. The order must be that the conviction is quashed and the sentence set aside. The fines, if paid, should be refunded.

Conviction Quashed.

CHUA TOH HUA AND ANOTHER v. LEE CHENG GIAM AND ANOTHER.

[Orig. Civil Juris. (Brown, J.) April 10, 1948]
[Singapore — Suit No. 69 of 1948]

Partnership action — Application to set aside writ on ground that proceedings ought to have been commenced in Kelantan — Forum Conveniens.

This was an application by the first defendant for an Order that a writ of Summons should be set aside. The action concerned a partnership business, which the first defendant contended was situate in Kelantan. The writ of Summons had been served on the first defendant in Singapore.

Held, (1) that to succeed in the application the first defendant must show (a) that no injustice would be done to the plaintiff by having the action tried in Kelantan, (b) that the defendant would be subject to such injustice in defending the action in Singapore as would amount to vexation and oppression; (2) that as the defendant had failed to show that he would be subjected to such injustice as would amount to vexation and oppression in defending the action the application must be dismissed.

Cases referred to :—

(1) *Ong Kin Hong v. Ong Cho Teck and others* (1935) 4 M.L.J. 142.
(2) *The Hagen* (1908) P. 189.
(3) *Logan v. Bank of Scotland* (1906) 1 K.B. 141.
(4) *In re Norton's Settlement* (1908) 1 Ch. 479.

SUMMONS IN CHAMBERS.

C. H. Smith for the Plaintiffs.

R. H. Green for the Defendant.

Brown, J. : — This is an interlocutory application by the first defendant for an Order that the writ be set aside. His first ground is that this Court is deprived of jurisdiction by section 2 (d) of the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946. But I do not think that that section can be made to apply to the matters which are at present before the Court as they appear in the endorsement to the writ. Whatever may transpire as this action proceeds upon its course, at this stage it would in my opinion be premature to set aside the writ upon that ground.

The next ground is that the proceedings ought to have been commenced in Kelantan and that they are vexatious and oppressive and an abuse of the process of the Court. A considerable part of the applicant's argument was devoted to shewing that the partnership business is situate in Kelantan and not, as the plaintiff-respondent contends, partly in Kelantan and partly in Singapore. The affidavits reveal a conflict upon this question of fact. But I do not think it is necessary for me to decide the question, and for the purpose of my judgment I will assume against the plaintiff that the business is situate wholly in Kelantan.

Upon that assumption, it was not disputed that if the plaintiff had applied to serve the writ out of the jurisdiction the application would have failed. But here the writ was served upon the applicant when he was in Singapore, and the fact that the plaintiff could not have succeeded in obtaining an order for service out of the jurisdiction is not of itself a ground for setting aside a writ which has been duly served. Mr. Green argued that "the comparative advantage in furtherance of justice to all parties" demanded that the action should be tried in Kelantan, and he placed much reliance on a decision of Mills J. in *Ong Kin Hong v. Ong Cho Teck and Others*[1]. That was an interlocutory application, which was similar to the present one, to determine whether the action should be allowed to proceed in Singapore or whether the proceedings should be set aside on the ground that the F.M.S. was the proper forum. The learned Judge, after tabulating the facts in favour of each side, came to the conclusion that on balance "the comparative advantage in furtherance of justice to all parties" required that the action should be tried in the F.M.S. The expression which I have quoted, and which was adopted by the learned Judge was the criterion for his decision, was taken from the judgment of Kennedy L.J. in *The Hagen*[2]. But, with all respect, there seems to me to be an important distinction between the two cases. *The Hagen* was a case in which the